IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 126 of 2002

with

CIVIL APPLICATION NO. 724 OF 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? :

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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SOMNATH TRADING CO.

Versus

KISHAN INDUSTRIES

Appearance:

1. Appeal from Order No. 126 of 2002
MR MB PARIKH for the Appellant
MR NIRJHAR S DESAI for the Respondents

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 29/04/2002

ORAL JUDGEMENT
Admitted.

2. Mr. Nirjhar S Desai, learned advocate appears and waives service of notice of admission on behalf of the respondents.

3. In the peculiar facts and circumstances of the case and with the consent of the learned advocates appearing for the parties, the matter is finally heard today and decided by this judgement.

4. In this Appeal from Order filed under Order 43 Rule 1(r) of the Code of Civil Procedure ('the Code' for short), appellant/original plaintiff seeks to challenge the order dated March 19, 2001 recorded below application Exhibit-5 in Special Civil Suit No. 95 of 2000 by the learned 2nd Joint Civil Judge (SD), Amreli by which application Exhibit-5 filed under Order 38 Rule 5 of the Code, by the appellant against the respondents/original defendants, seeking the relief of issuance of order of attachment before judgement with respect to the property mentioned in para 2 of the application, that is, the agricultural land bearing Revenue Survey Nos. 565 and 566 paiki 6 Acres and 33 gunthas situated at Amreli (suit property for short), came to be rejected.

5. The appellant has filed suit against the respondents for recovery of Rs.23,19,588/- as the appellant has sold the groundnuts to the respondents at different point of times.

6. Along with the suit, application Exhibit-5 is also moved wherein relief is claimed to issue order of attachment before judgement with respect to the suit property. In the said application it is pleaded that there is a primafacie case in favour of the appellant and balance of convenience also tilts in his favour and if the relief prayed for is not granted, the suit filed by the appellant would become infructuous as the appellant will not be able to recover the decretal amount on the basis of the decree which will be passed in his favour and against the respondents.

7. The suit is contested by the respondents by filing written objections inter alia denying all the

averments made in the application Exhibit-5 and contended that there is no outstanding dues against the respondents and respondents are also not going to dispose of the suit property. It is further contended that the apprehension of the appellant that the respondents are trying to dispose of the suit property is not well-founded and, therefore, there is no primafacie case in favour of the appellant nor balance of convenience tilts in his favour and, therefore, it is prayed to dismiss the application Exhibit-5.

8. The learned Judge, after hearing the learned advocates appearing for the parties and on analysis, appreciation and evaluation of the evidence adduced and produced before him, came to the conclusion that there is no primafacie case in favour of the appellant and resultantly dismissed the application Exhibit-5, which has given rise to the present Appeal from Order at the instance of the original plaintiff.

9. I have heard Mr. M.B.Parikh, learned advocate for the appellant and Mr. Nirjhar S Desai, learned advocate for the respondents. I have perused the averments made in the appeal, grounds set out therein and the impugned order which is the subject matter of challenge in this Appeal from Order.

10. On the facts and in the circumstances emerging from the record of the case and on having perusal of the impugned order, it is seen that the learned Judge has not given cogent reasons for rejecting the application Exhibit-5. The learned Judge went on footing that the respondents are not likely to dispose of the suit property and, therefore, the apprehension made by the appellant is not well-founded and on that basis the learned Judge has rejected the application Exhibit-5. The learned Judge has not discussed anything about the suit transactions and the outstanding dues of the appellant against the respondents. It may be noted that the appellant has filed suit for recovery of Rs.23,19,588/- from the respondents and, therefore, naturally, respondents must be put to certain conditions, that is, not to transfer or alienate the suit property till disposal of the suit.

11. On over all view of the matter, I am of the opinion that the learned Judge has committed an error in rejecting the prayer made by the appellant. The learned Judge ought to have granted the prayer of injunction instead of granting attachment before judgement against the respondents and restrained them from transferring or

alienating the suit property, till disposal of the suit.

12. Seen in the above context, there is a valid reason to interfere with the impugned order by granting the prayer made in the application Exhibit-5 and hence, this Appeal from Order deserves to be allowed in part.

13. For the foregoing reasons, the Appeal from Order succeeds in part and accordingly it is partly allowed with no order as to costs. The respondents are restrained from transferring or alienating the suit property, that is, Revenue Survey Nos. 565 and 566 paiki 6 acres and 33 gunthas which are mentioned in Revenue record No. 7 & 12 at mark 4/1 and 4/2, till disposal of the suit.

14. No order on Civil Application No. 724 of 2002. Rule issued therein is discharged.

15. On the facts and in the circumstances of the case, the learned Judge of the lower Court is directed to expedite the trial of the suit and conclude the hearing including delivering the judgement on or before December 31, 2002. However, in doing so regard shall also be had to the exigency of his files.

16. It is also made clear that the observations made by this Court are tentative in nature and at an interlocutory stage, which shall not come in the way of the decision of the suit.

Direct service is permitted.

(A.M.Kapadia,J)

Jayanti*